

**WORKERS' COMPENSATION ADVISORY COUNCIL**  
**MINUTES ~FEBRUARY 11, 2000 MEETING [10:00 A.M.]**  
**LEGISLATIVE PLAZA - MEETING ROOM #29**  
**NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Steve Adams, State Treasurer, Chair

Voting members in attendance:

Mr. Jack Gatlin  
Mr. James G. Neeley  
Mr. Bob Pitts  
Mr. Othal Smith, Jr. [by proxy to Mr. Neeley]  
Mr. Steve Turner  
Mr. Carter Witt

Nonvoting members in attendance:

Ms. Jackie Dixon  
Mr. Tony Farmer  
Ms. Abbie Hudgens  
Mr. Jerry Mayo

Ex officio members in attendance:

Ms. Sue Ann Head, Workers' Compensation Administrator  
Ms. Maria P. Draper, Assistant Commissioner  
    Department of Labor and Workforce Development  
    [designees for Commissioner Michael E. Magill]  
Mr. Neil Nevins, Assistant Commissioner  
    Department of Commerce and Insurance  
Mr. Dale Sims, Assistant to the Treasurer

Also present:

M. Linda Hughes, Executive Director  
David Wilstermann, Research Analyst

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The meeting of the Advisory Council was held in the Legislative Plaza at the request of Representative Ben West, Jr., Chair of the House Consumer and Employee Affairs Committee to provide the individual members of the General Assembly the opportunity to address the Advisory Council concerning pending workers' compensation bills sponsored by the legislator, if they desired.

## **A. CONSIDERATION OF PENDING WORKERS' COMPENSATION LEGISLATION**

The Advisory Council heard comments from the following legislators prior to consideration of the bills: Representative Rob Briley; Representative Frank Buck; and Representative Gary Odom. In addition, the following individuals were afforded the opportunity to express their opinions and comments concerning specific bills: David Williams [Insurers of Tennessee]; David Broemel [American Insurance Association]; Dave Goetz [Tennessee Association of Business]; and Phil Keffer.

Prior to the meeting the Advisory Council had received summaries prepared by staff for each bill containing an summary of the current law, the proposed change and the practical effect of the proposed legislation. The Advisory Council approved the summaries prepared by staff for transmittal to the Joint Committee, except for the informational notes from staff which the Advisory Council determined should be omitted.

The Executive Director explained each bill prior to its consideration. The comments of the members and the actions taken by the Advisory Council as to each workers' compensation bill are as follows:

### **1. SB 2053\* by Crutchfield HB 2119 by Buck**

#### ***Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Tony Farmer commented that as the bill is drafted the TOSHA violation would not have to be by the employer.

*Attorney Representative:* Ms. Jackie Dixon expressed concern that the TOSHA appeal process could cause delay in the determination of the death benefits which were due.

*Municipal Government Representative:* Ms. Abbie Hudgens indicated she had concerns as to whether the cause of action is triggered by just a TOSHA violation. She also pointed out that the employer is not afforded an opportunity to question the decision of the TOSHA field worker.

*Insurance Companies Representative:* Mr. Jerry Mayo pointed out that the bill relies on the insurance carrier to pay the treble damages when the need is to punish the employer for its behavior. In his opinion, a subrogation right against the employer is not a valid remedy for the insurance carrier. He expressed his opinion that the bill was over broad and needed additional revision.

#### ***Comments of Voting Members:***

*Employee Representatives:* Mr. Jim Neeley indicated his opinion that the TOSHA appeals process would provide the needed protection for the employer.

*Employer Representatives:* Mr. Bob Pitts stated he was in sympathy with the intent of the bill, but felt the issue should be addressed in the TOSHA arena and not in the workers' compensation system and that workers' compensation should be kept separate from TOSHA.

***Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

**2. SB 2054\* by Crutchfield HB 2121 by Buck**

***Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Farmer noted that the amount of money being paid in a workers' compensation case is the issue which is always appealed. He is concerned the bill could conflict with the Rules of Appellate Procedure which allow the Supreme Court [or Appeals Panel] to review any issue whether the parties appeal the issue or not. Therefore, in his opinion, there is never any final issue on a workers' compensation judgment which is appealed. In those instances, if the bill passed, money could have been paid out on an issue which was not appealed by the parties and the Supreme Court could reverse the trial court on that issue.

*Attorney Representative:* Ms. Dixon agreed with Mr. Farmer's comments. In her opinion, the bill would create a procedural nightmare and would cause real problems.

***Comments of Voting Members:***

*Employer Representatives:* Mr. Pitts stated while he understood the concerns with providing benefits to the worker on a timely basis it appeared the current Tennessee Rules of Appellate Procedure do not provide an avenue to do as the bill suggests.

***Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives deferred to the legislature. The employer representatives recommended against passage of the bill for the reasons stated in the summary and by the nonvoting members.

### 3. SB 2055\* by Crutchfield HB 2116 by Buck

#### *Comments of Non-Voting Members:*

*Municipal Government Representative:* Ms. Hudgens pointed out that if a workers' compensation settlement includes payment of medical expenses, the language of the bill would require payment of "any" medical expense, when the terms of the settlement may be different.

*Insurance Companies Representative:* Mr. Mayo indicated he had concerns as to whether a workers' compensation court had jurisdiction over a **third party health insurer**. Mr. Mayo also questioned the identity of the "third party" as identified in the bill.

#### *Comments of Voting Members:*

*Employer Representatives:* Mr. Witt was concerned as to whether the sponsor's intent was to have the bill apply to **third party health insurers** or whether it should apply only to the workers' compensation insurer.

#### *Recommendation of the Advisory Council [Voting Members]*

The Advisory Council **recommended passage** [5 votes for passage; Mr. Witt abstained] of the bill **provided** the bill was amended to add medical expenses to TCA 50-6-225(j), the current statute which allows recovery of a bad faith penalty of up to 25% for failure of the employer to pay temporary total disability benefits.

### 4. SB 2076 by Cooper HB 2008\* by Fraley

#### *Comments of Non-Voting Members:*

*Municipal Government Representative:* Ms. Hudgens expressed her opinion that permanent total disability benefits should cease at normal retirement age as she felt that was the original intent of TCA 50-6-207(4)(A)(i). The benefits allowed by the bill would be an enhancement of benefits beyond what is appropriate as it extends the benefits past normal retirement age.

*Insurance Companies Representative:* Mr. Mayo stated he would like to see the actuarial impact of the bill on the workers' compensation system. He also questioned whether lump sum payments should be allowed if permanent total benefits are extended until the death of the worker.

#### *Comments of Voting Members:*

*Employee Representatives:* Mr. Neeley noted the majority of states pay permanent total benefits for the life of the employee.

*Employer Representatives:* Mr. Witt stated workers' compensation benefits are designed to be wage replacement until a worker retires from the work force. Mr. Pitts agreed with Mr. Witt's statement, but added he felt it would be appropriate to amend TCA 50-6-207(A)(4)(i) to allow permanent total

benefits until the date of the employee's full retirement age. Mr. Tumer questioned the logic of allowing an offset for social security benefits attributable to the employer's contributions and not allowing an offset for employer funded pension plan benefits.

***Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill because the majority of states allow permanent total benefits until the death of the employee. The employer representatives recommended against passage of the bill because workers' compensation benefits are intended as wage replacement, not retirement or lifetime benefits.

The Advisory Council **unanimously recommended**, in the event the bill is not passed, that the General Assembly consider amending TCA 50-6-207(4)(A)(i) by deleting the phrase "sixty-five (65) years of age" in the second sentence and substituting the language "the employee's full retirement age".

**5. SB 2118\* by Cohen HB 2114 by Buck**

***Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill as they felt the bill, as drafted, would not accomplish the stated intent of the sponsor.

The Advisory Council **unanimously recommended the concept, as expressed by the sponsor, to allow post-judgment interest to accrue on "discretionary" costs**. The Advisory Council suggested the following language might accomplish the stated intent of the bill:

"(3) For purposes of this subsection "judgment" and "decree" shall include any discretionary costs awarded pursuant to the Tennessee Rules of Civil Procedure and any costs awarded pursuant to TCA 50-6-226(c)(1)."

**6. SB 2176\* by Cooper HB 2995 by West*****Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill **provided it is amended** to require the mailing be “by certified mail, receipt return requested”.

**7. SB 2381\* by Clabough HB 2320 by Kisber*****Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

**8. SB 2382 by Clabough HB 2319\* by Kisber*****Comments of Voting Members:***

*Employee Representatives:* Mr. Neeley stated it should be noted that the annual collection of workers' compensation insurance premium taxes is approximately thirty-five million dollars [\$35,000,000].

***Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill **provided it is amended** to address the issues raised in the “Practical Effect” section of the bill analysis prepared by staff.

**9. SB 2469 by Kyle HB 2291\* by Odom*****Advisory Council on Workers' Compensation Comment******Comments of Non-Voting Members:***

*Insurance Companies Representative:* Mr. Mayo pointed out that not all workers' compensation insurance carriers which are authorized to conduct business in Tennessee also write health insurance.

***Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended against passage** of the bill. The recommendation was based on the fact that a significant number of workers' compensation insurance carriers do not write health insurance and the proposed bill would decrease competition in the workers' compensation insurance market which could lead to increased workers' compensation premiums.

**10. SB 2483 by Haynes HB 2238\* by Buck*****Advisory Council on Workers' Compensation Comment******Comments of Voting Members:***

*Employer Representatives:* Mr. Pitts noted the present bill is similar to another pending bill and expressed concern as to whether all bills addressing the same issue should be enacted.

***Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill **provided** it is **amended** to give the Commissioner of the Department of Labor and Workforce Development the authority to assess and collect the fine and to require any collected fine would be payable to the Uninsured Employers Fund [which is proposed by SB 2382/HB 2319\*].

**11. SB 2484 by Haynes HB 2233\* by Buck*****Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

**12. SB 2492 by Haynes HB 2115\* by Buck*****Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

**13. SB 2503\* by Haynes HB 2585 by Briley****Advisory Council on Workers' Compensation Comment*****Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Farmer stated he has genuine concern that the bill creates a new cause of action and that it will affect the employee's choice of remedies. He is fearful an attorney will take the case because it appears to have great monetary potential [treble damages] only to drop the case later when it is determined the uninsured employer has no assets. The employee's election to pursue the treble damages route would bar the employee from receiving benefits from the Uninsured Employers Fund.

*Attorney Representative:* Ms. Dixon expressed similar concerns to those raised by Mr. Farmer.

*Municipal Government Representative:* Ms. Hudgens noted not all uninsured employers have sufficient assets to satisfy a treble damages award. Therefore, not all employees who pursue this route will be able to recover benefits. She stated the need to protect employees of uninsured employers should outweigh allowing those few employees who would be able to recover the treble damages awarded. Additionally, it was her feeling that any penalty in excess of benefits should go to the Uninsured Employers Fund.

*Insurance Companies Representative:* Mr. Mayo felt an employee should not reap triple his/her workers' compensation benefits. He favored allowing the employee to recover the workers' compensation benefits, with double the benefits being paid into the Uninsured Employers Fund.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Neeley stated he supported incorporating any penalty against an uninsured employer into the Uninsured Employers Fund but that he opposed the creation of a new cause of action. Mr. Neeley agreed with Mr. Witt's comments that all current penalties should go into the Uninsured Employers' Fund.

*Employer Representatives:* He questioned the wisdom of an additional penalty against an uninsured employer because of an injury to a worker. Mr. Pitts also questioned whether the attorney's fee would be computed on the total value of all benefits and whether the medical benefits would be tripled. Mr. Witt stated support for the idea that any penalties against the uninsured employer above the workers' compensation benefits should be paid into the Uninsured Employers Fund. He noted that other penalties currently provided by law should also be payable to the Uninsured Employers Fund.



***Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended against passage** of the bill **as drafted**.

The **Advisory Council unanimously supported** the concept that all penalties assessed against an employer for non-coverage should be considered in concert with the proposed Uninsured Employers Fund and that any penalties assessed against such an employer should be paid to the Uninsured Employers Fund. In addition, the Advisory Council recommended any other penalties which can be assessed against a noncompliant employer be paid into the Uninsured Employers Fund.

**14. SB 2709\* by Cooper HB 2462 by Odom****Advisory Council on Workers' Compensation Comment*****Comments of Voting Members:***

*Employee Representatives:* Mr. Neeley stated he did not understand why employers are not willing to permit chiropractic care in back injury cases as he believes this would allow the employee to return to work more quickly.

*Employer Representatives:* Mr. Turner pointed out that employers are currently allowed to place a chiropractor on the panel of three physicians which is provided to the employee.

***Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended passage of the bill. The employer representatives recommended against passage of the bill.

**15. SB 2752 by Rochelle HB 2049\* by West****Advisory Council on Workers' Compensation Comment*****Comments of Non-Voting Members:***

*Municipal Government Representative:* Ms. Hudgens expressed her opinion that permanent total disability benefits should cease at normal retirement age as she felt that was the original intent of

TCA 50-6-207(4)(A)(i). The benefits allowed by the bill would be an enhancement of benefits beyond what is appropriate as it extends the benefits past normal retirement age.

*Insurance Companies Representative:* Mr. Mayo stated he would like to see the actuarial impact of the bill on the workers' compensation system. He also questioned whether lump sum payments should be allowed if permanent total benefits are extended until the death of the worker.

***Comments of Voting Members:***

*Employee Representatives:* Mr. Neeley noted the majority of states pay permanent total benefits for the life of the employee.

*Employer Representatives:* Mr. Witt stated workers' compensation benefits are designed to be wage replacement until a worker retires from the work force. Mr. Pitts agreed with Mr. Witt's statement, but added he felt it would be appropriate to amend TCA 50-6-207(A)(4)(i) to allow permanent total benefits until the date of the employee's full retirement age. Mr. Turner questioned the logic of allowing an offset for social security benefits attributable to the employer's contributions and not allowing an offset for employer funded pension plan benefits.

***Recommendation of the Advisory Council [Voting Members]***

The voting members are **equally divided on this bill**. The employee representatives recommended passage of the bill because the majority of states allow permanent total benefits until the death of the employee. The employer representatives recommended against passage of the bill because workers' compensation benefits were intended as wage replacement, not retirement or lifetime benefits.

The Advisory Council **unanimously recommended**, in the event the bill does not pass, that the General Assembly consider amending TCA 50-6-207(4)(A)(i) by deleting the phrase "sixty-five (65) years of age" in the second sentence and substituting the language "the employee's full retirement age".

**16. SB 2867\* by Springer HB 2971 by Jackson**

***Advisory Council on Workers' Compensation Comment***

***Comments of Non-Voting Members:***

*TTLA Attorney Representative:* Mr. Farmer recommended against passage of the bill because it could be an impediment to settlements in those cases in which compensability of the injury is disputed.

***Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended against passage** of the bill. The Advisory Council stated it supported the concept that TennCare should be reimbursed if it has paid medical expenses in a workers' compensation case which is determined to be compensable. The Advisory Council stated, however, that it felt the bill, as drafted, would be detrimental to the workers' compensation system and would not be that significant a benefit to the TennCare program.

**17. SB 2980 by Elsea HB 2729\* by Cole (Dyer)*****Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

**18. SB 2982 by Elsea HB 2730\* by Cole (Dyer)*****Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

**19. SB 2983 by Elsea HB 2731\* by Cole (Dyer)*****Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

**20. SB 2984 by Elsea HB 2732\* by Cole (Dyer)*****Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

**21. SB 2985 by Elsea HB 2733\* by Cole (Dyer)*****Recommendation of the Advisory Council [Voting Members]***

The voting members were **equally divided on this bill**. The employee representatives recommended against passage of the bill. The employer representatives recommended passage of the bill.

**22. SB 3248 by Haynes HB 3215\* by Turner (Ham)*****Advisory Council on Workers' Compensation Comment******Comments of Voting Members:***

*Employer Representatives:* Mr. Pitts stated while he supports treatment of fraud by employees and others in the same manner, he does not think the acts described in these two sections are of equivalent severity to justify the same criminal punishment.

***Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously took no position on the bill** as written. The Advisory Council indicated it was interested in the opinion of the TBI and that it is willing to reconsider the bill if so requested.

**23. SB 3249 by Haynes HB 3216\* by Turner (Ham)*****Recommendation of the Advisory Council [Voting Members]***

The Advisory Council **unanimously recommended passage** of the bill.

At the conclusion of the Advisory Council's consideration of pending legislation, the Advisory Council adjourned at 3:15 p.m. subject to the call of the Chair.